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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID WYLLIE and PHILLIP HIGHT,
Petitioners,

vs.

EDWARD LEE DUNN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the entry of petitioner law enforcement officials into the respondent's home in 1978 pursuant to an arrest warrant for the respondent's son states a cause of action under 42 U.S.C. §1983.

II. Whether a cause of action under 42 U.S.C. §1983 based upon an allegedly unconstitutional arrest accrues at the time of the arrest or after the termination in favor of the accused of the state criminal prosecution following the arrest.

III. Whether the state cause of action for malicious prosecution states a cause of action under 42 U.S.C. §1983.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorites	iv
Opinions Below	1
Grounds on Which Jurisdiction is Invoked	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons Relied on for the Allowance of the Writ	5
I. The Sixth Circuit Erred In Holding That A 1978 Entry Into The Respondent's Home Pursuant To An Arrest Warrant For The Respondent's Son States A Cause Of Action Under 42 U.S.C. §1983	5
II. The Decision Of The Sixth Circuit That A Cause Of Action Under 42 U.S.C. §1983 For An Allegedly Unconstitutional Arrest Does Not Accrue Until The Termination In Favor Of The Accused Of The State Criminal Prosecution Following The Arrest Is Error And In Conflict With Decisions Of Other Circuits.	7
III. The Sixth Circuit Erred In Holding In Effect That Malicious Prosecution States A Cause Of Action Under 42 U.S.C. §1983	8
Conclusion	9
Appendix A:	
Opinion of the United States Court of Appeals for the Sixth Circuit	A-1

Appendix B:

Memorandum of the United States District Court for the Middle District of Tennessee, Nashville Division A-12

TABLE OF AUTHORITIES

Cases:

Baker v. McCollan, 443 U.S. 137, 140 (1979) 5,9

Board of Regents, etc. v. Tomanio, 446 U.S. 478 (1980) 7

Curry v. Ragan, 257 F.2d 449 (5th Cir.), cert. denied, 358 U.S. 851, 79 S.Ct. 78, 3 L.Ed.2d 85 (1958) 8

Dorsey v. NAACP, 408 F.2d 1022 (5th Cir.) cert. denied, 396 U.S. 847 (1969) 5

Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) 9

Gowin v. Altmiller, 663 F.2d 820 (9th Cir. 1981) 8

Harlow v. Fitzgerald, ____ U.S. ____, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 6

Payton v. New York, 445 U.S. 573 (1980) 6

Pyles v. Keane, 418 F.Supp. 269 (S.D.N.Y. 1976) 8

Rinehart v. Locke, 454 F.2d 313 (7th Cir. 1971) 7

Steagald v. United States, 451 U.S. 204 (1981) 5,6

Strung v. Anderson, 452 F.2d 632 (9th Cir. 1971) 7,8

United States v. Jones, 641 F.2d 425 (6th Cir. 1981) 6

United States v. McKinney, 379 F.2d 259 (6th Cir. 1967) 6

United States v. Shye, 492 F.2d 886 (6th Cir. 1974) 6

United States v. Sumlin, 567 F.2d 684 (6th Cir. 1977), cert. denied, 435 U.S. 932 (1978) 6

Constitution:

United States Constitution Amendment IV 2,6,8

United States Constitution Amendment XIV, § 1 2,8

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2,3,4,5,7,8,9

42 U.S.C. § 1985 3,4,7

T.C.A. § 28-3-104(a) 3

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered on December 30, 1982, and is attached as Appendix A.

The opinion of the United States District Court for the Middle District of Tennessee was rendered on March 10, 1981, and is attached as Appendix B.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 30, 1982. No rehearing was sought in that court nor has any extension of time in which to file this petition been sought in this Court.

The provisions of 28 U.S.C. §1254(1) are believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

T.C.A. §28-3-104(a):

> Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breech of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages or both, brought under the federal civil rights statutes, and actions for statutory penalty shall be commenced within one year after cause of action accrued.

STATEMENT OF THE CASE

The respondent brought suit on August 27, 1980, in the United States District Court for the Middle District of Tennessee seeking monetary damages against the petitioners and other defendants under 42 U.S.C. §1983 alleging an unlawful search of his home, false arrest, false imprisonment, and malicious prosecution in the state courts of Tennessee.[1]

The plaintiffs' allegations were summarized by the District Court as follows:

> Plaintiff alleges that on December 26, 1978, Tennessee State Trooper Wyllie and Deputy Sheriff Phillip Hight

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[1] Defendants other than the petitioners, including the State of Tennessee, the State Attorney General, Sumner County, and Mayo Wicks, the Sheriff of Sumner County, have been dismissed and are not before this Court. The petitioners' allegations of violation of 42 U.S.C. §1985 have also been dismissed and are not before this Court.

> came to his house to arrest his son pursuant to a warrant for a misdemeanor traffic violation. When plaintiff informed Wyllie and Hight that his son was not there, they requested permission to search the house. Upon plaintiff's denial of permission for the search, Wyllie arrested him for interfering with the duty of a police officer. After the search of plaintiff's home for his son proved unsuccessful, Wyllie and Hight handcuffed him and transported him to the Sumner County Jail where he was booked and held until he posted bond.
>
> Subsequently, plaintiff was convicted in the Circuit Court of Sumner County for 'interfering with the duty of a police officer' and fined two dollars. On March 28, 1980, the Tennessee Court of Criminal Appeals reversed the conviction holding that proof of resistance was insufficient to establish the element of 'interference' necessary to the commission of the offense charged . . ..
>
> The Tennessee Supreme Court then denied the State's application for permission to appeal [concurring only in the results].

In a memorandum opinion filed March 10, 1981, the District Court dismissed the claims of illegal search, false imprisonment, and false arrest as being time-barred under T.C.A. §28-3-104, the applicable statute of limitations. The District Court dismissed the malicious prosecution claim for failure to state a cause of action upon which relief could be granted. *See* Appendix B for full text opinion.

A panel of the United States Court of Appeals for the Sixth Circuit reversed the dismissal of the §1983 claims against the petitioners. *See* Appendix A for full text of Court of Appeals opinion.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. The Sixth Circuit Erred In Holding That A 1978 Entry Into The Respondent's Home Pursuant To An Arrest Warrant For The Respondent's Son States A Cause Of Action Under 42 U.S.C. §1983.

The first inquiry in any suit brought under federal civil rights statutes is "whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' " *Baker* v. *McCollan,* 443 U.S. 137, 140 (1979). The federal civil rights statutes "were not intended to preempt state laws in their proper role of indicating what are essentially state-guaranteed rights." *Dorsey* v. *NAACP,* 408 F.2d 1022, 1024 (5th Cir.), *cert. denied,* 396 U.S. 847 (1969).

In the instant case, the Sixth Circuit found that the complaint could be interpreted as alleging:

> That the defendants Wyllie and Hight, acting under color of law, deprived plaintiff of his constitutional rights under the Fourth Amendment . . .to be free from unreasonable searches and seizures. They did so by arresting him and prosecuting him because he attempted to exercise that right.

Opinion at 7. In reaching this decision, the Sixth Circuit analyzed the conduct of the petitioners in light of Sixth Circuit decisions which purportedly require an arrest warrant rather than a search warrant when seeking to arrest a suspect in the home of a third party. Although this Court's decision in *Steagald* v. *United States,* 451 U.S. 204 (1981) held that a search warrant is required in order to arrest a subject of an arrest warrant in the

home of a third party, at the time the search in the instant case took place, December 26, 1978, such was not the law.[2]

The complaint of the respondent alleges that the petitioners had an arrest warrant for the respondent's son. The petitioners, therefore, submit that the Sixth Circuit erred in holding that the petitioner had stated a cause of action for which relief can be granted based upon a violation of the Fourth Amendment. At the least, the petitioners are entitled to qualified executive immunity under *Harlow* v. *Fitzgerald,* ____ U.S. ____, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).[3]

The petitioners would also point out that the respondent's complaint did not allege that the plaintiff's son did not live at the home of the plaintiff. The complaint in addition failed to allege the petitioner's lack of probable cause to believe that the son lived at the residence. *Payton* v. *New York,* 445 U.S. 573 (1980) makes it clear that only an arrest warrant is required where entry is sought to the residence of a suspect.

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[2] The pre-*Steagald* cases cited by the Sixth Circuit would not have put the petitioners on notice that the arrest of a suspect in the home of a third party requires a search warrant. In *United States* v. *Shye,* 492 F.2d 886, 891 (6th Cir. 1974), the Sixth Circuit did not distinguish between arrest warrants and search warrants. The issue was discussed in *United States* v. *Sumlin,* 567 F.2d 684, 686, n.1 (6th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978), but the court reached no resolution. In *United States* v. *McKinney,* 379 F.2d 259, 263 (6th Cir. 1967), the Sixth Circuit held that an arrest warrant is an exceptional circumstance obviating the need for a search warrant. *United States* v. *Jones,* 641 F.2d 425 (6th Cir. 1981), which reached an opposite conclusion, was decided after the search in question in the instant case.

[3] *Harlow* v. *Fitzgerald,* which abolished the subjective test in determining qualified official immunity, was decided on June 24, 1982, after the memorandum opinion of the District Court in the instant case had been issued on March 10, 1981.

II. The Decision Of The Sixth Circuit That A Cause Of Action Under 42 U.S.C. §1983 For An Allegedly Unconstitutional Arrest Does Not Accrue Until The Termination In Favor Of The Accused Of The State Criminal Prosecution Following The Arrest Is Error And In Conflict With Decisions Of Other Circuits.

Even assuming that the respondent has stated a cause of action or that the petitioners are not entitled to immunity, the Sixth Circuit erred in finding that the complaint was not time barred. It is well established that a federal court must look to the applicable state statute of limitation to determine whether or not a claim for relief under 42 U.S.C. §1983 is barred. *Board of Regents, etc.* v. *Tomanio,* 446 U.S. 478 (1980). In Tennessee, the applicable statute, T.C.A. §28-3-104 sets forth a one-year statute of limitations.

In the instant case, the arrest took place on December 26, 1978. The respondent, however, did not bring suit until August 27, 1980, more than one year after the arrest. Notwithstanding that the only allegation of unconstitutional behavior it found centered on the December 26, 1978, arrest, the Sixth Circuit grafted the allegation of an unconstitutional arrest onto the allegation charging malicious prosecution. It then held that a cause of action for malicious prosecution did not accrue until such time as the prosecution was terminated in favor of the respondent. As a result, it found the action to be timely filed since it was filed within one year from the date of the conclusion of the appeal from the respondent's criminal conviction.

However the Sixth Circuit seeks to characterize this case, it is clear that the gravamen of the respondent's complaint is the alleged unconstitutional arrest. In *Rinehart* v. *Locke,* 454 F.2d 313 (7th Cir. 1971) and *Strung* v. *Anderson,* 452 F.2d 632 (9th Cir. 1971), other circuits held that where the gravamen of a complaint is an unconstitutional search or seizure, the action accrues at the time of the search or seizure.

Furthermore, the Ninth Circuit has explicitly addressed the statute of limitations problem created when a prosecution follows upon an allegedly unconstitutional search or seizure. In *Strung*, the plaintiffs contended that their state criminal prosecution following an illegal seizure of marijuana postponed the running of the applicable statute of limitations. The Ninth Circuit, however, rejected this argument, noting that, "The acts of the prosecutor and the court were not wrongful and they were not the acts of the appellees personally nor vicariously." 452 F.2d at 633. *See also Gowin* v. *Altmiller*, 663 F.2d 820 (9th Cir. 1981). Thus, simply labeling the claim one for malicious prosecution, rather than one for an unconstitutional search and seizure, does not operate to postpone the accrual of the cause of action where the only constitutional provision allegedly violated is that of the Fourth Amendment.

III. The Sixth Circuit Erred In Holding In Effect That Malicious Prosecution States A Cause Of Action Under 42 U.S.C. §1983.

Without the allegation of the unconstitutional arrest, the complaint about which is time-barred, the plaintiff has, at most, alleged a state cause of action for malicious prosecution. In *Curry* v. *Ragan*, 257 F.2d 449, 450 (5th Cir.), *cert. denied*, 358 U.S. 851, 79 S.Ct. 78, 3 L.Ed.2d 85 (1958), the Court held:

> Neither the Fourteenth Amendment nor the Civil Rights Acts purported to secure a person against unfounded or even malicious claims or suits in state courts, especially so when the laws and courts of the state are available and furnish adequate remedies to a person aggreived.

Accord, e.g., *Pyles* v. *Keane*, 418 F.Supp. 269, 276 (S.D. N.Y. 1976).

Declining to constitutionalize a claim of false imprisonment in a §1983 action, this Court stated:

> The Constitution does not guarantee that only the guilty will be arrested. If it did, Section 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect release.

Baker v. *McCollan, supra,* at 145, 99 S.Ct. at 2695. In this case, it may be similarly observed that the Constitution does not guarantee that only the guilty will be prosecuted. And just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle* v. *Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251, 261 (1976), malicious prosecution does not become a violation of the "Constitution and laws" merely because the defendants are state officials.

Whatever claim the situation in this case might give rise to under state law, it gives rise to no claim under the United States Constitution. The decision of the Sixth Circuit should, therefore, be reversed and the District Court's dismissal of the plaintiff's claim should be affirmed.

CONCLUSION

The petitioners concede that this Court does not sit as a court of error in review of decisions of the various United States circuit courts of appeal. Nevertheless, the petitioners submit that the holding of the Sixth Circuit that the respondent's complaint states a cause of action is so clearly erroneous as to justify review by this Court. The decision of the Sixth Circuit indicates that instruction to the lower federal courts is necessary on the issue of the relationship between classical state causes of action such as malicious prosecution to 42 U.S.C. §1983. In addition, review by this Court would clarify the conflicting decisions among the circuits regarding the accrual of a statute of limitations under 42 U.S.C. §1983.

For the reasons stated, the petitioners urge the Court to grant the Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

No. 81-5217

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Edward Lee Dunn,
Plaintiff-Appellant,

v.

The State of Tennessee, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed December 30, 1982

Before: KEITH and MERRITT, Circuit Judges, and JOHNSTONE, District Judge.*

JOHNSTONE, District Judge. Plaintiff appeals a judgment of the district court dismissing his complaint, seeking relief under 42 U.S.C. §§ 1983 (1970) and 1985(3) (1970), for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). We are of the opinion that plaintiff states a claim actionable under 1983 against certain defendants, but agree with

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* The Honorable Edward H. Johnstone, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

the district court's dismissal of the 1983 action against other parties and with the lower court's dismissal of the 1985 claim against all defendants.

Mr. Dunn's complaint alleges that at 10:00 P.M. on the night of December 26, 1978, David Wyllie, a Tennessee state trooper, and Phillip Hight, a deputy sheriff for Sumner County, Tennessee, came to his residence with a misdemeanor arrest warrant for his son. It was Wyllie's fourth trip and Hight's second to the Dunn home. The two officers requested Dunn's permission to enter the house to look for the son. Dunn, dressed in pajamas, told the officers that his son was living with Dunn's wife in Nashville. He stood in the doorway and passively, but firmly, denied the two officers entry. There is nothing in the record to indicate that Dunn was even impolite to the officers.[1]

At this point, the two officers forced entry, searched unsuccessfully for Dunn's son, and arrested Dunn for "interfering with the duty of a police officer." The officers handcuffed Dunn and drove him to the Sumner County Jail, where he was booked and required to post bail.

Both Wyllie and Hight testified at Dunn's criminal trial. Dunn was found guilty of interfering with the duty of a police officer. He appealed his conviction to the Sumner County Circuit Court and ultimately to the Tennessee Criminal Court of Appeals. The apellate court dismissed the charge finding no "interference." The state applied to the Tennessee Supreme Court for review of the dismissal, but the Court denied the application.

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[1] The Tennessee Criminal Appeals Court opinion, rendered in Dunn's state criminal appeal, specifically stated that ". . . the record is wholly devoid of any evidence of threats, force, or threatening behavior on Mr. Dunn's, or even the kind of harsh language that one might expect under the circumstances." This opinion was made a part of Dunn's complaint.

Dunn filed this action in the United States District Court for the Middle District of Tennessee against, among others, Wyllie, Hight, Sumner County and Mayo Wix, its Sheriff, alleging the arrest, imprisonment, and prosecution deprived him ". . . of his liberty and his rights and privileges of being secure in his person and property." That court dismissed plaintiff's complaint against all defendants. The district court found the allegations of malicious prosecution devoid of any violations of constitutional rights. In a footnote to the opinion, the Court noted that this claim ". . . may be time-barred in this Court . . . [because] . . . any claim under § 1983 must be filed within one year from the actual date of the constitutional violation. 4A Tenn. Code Ann. § 28-3-104."

Three issues are presented for review. First, whether under the facts alleged in the complaint, a claim of malicious prosecution is actionable under Sections 1983 and 1985. Second, if the claim is actionable, whether the cause of action accrued upon the date of the successful outcome of the underlying action. Finally, whether the defendants named in the appeal are immune from the action.

This Court agrees with the district court that plaintiff failed to state a cause of action under 1985(3).[2] To state a claim actionable under this section, a complaint must allege two necessary elements: (1) the existence of a conspiracy, and (2)

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[2] Depriving persons of rights or privileges.

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. 42 U.S.C. § 1985 (3) (1970) (in pertinent part).

some "class-based discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); *Browder* v. *Tipton,* 630 F.2d 1149, 1150 (6th Cir. 1980). Dunn is a white male and his complaint contains no allegations that he was deprived *equal* protection or *equal* privileges and immunities because of discrimination nor that a conspirary existed among the defendants. This claim was properly dismissed against all defendants. *Macko* v. *Bryon,* 641 F.2d 447, 450 (6th Cir. 1981). However, the trial court erred, in part, in dismissing plaintiff's claim of malicious prosecution as actionable under 42 U.S.C. § 1983.[1]

Dunn alleges that the ". . . defendants . . . falsely, wrongfully, willfully, and maliciously prosecuted [Dunn] upon said alleged charge of interfering with a police officer, . . . with the intent to deprive the plaintiff of his liberty and his rights and privileges of being secure in his person and property. . . ." The district court accepted these allegations as true, but held that they were insufficient to raise a state tort claim of malicious prosecution to the level of an action cognizable under 1983.

The standard for reviewing the sufficiency of the allegations in a complaint for an action under 1983 was stated in *Westlake* v. *Lucase,* 537 F.2d 857, (6th Cir. 1976), where we held:

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[1] Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for resdress.

42 U.S.C. § 1983 (1970).

> [d]ismissals of complaints under the civil rights statutes are scrutinized with special care. A complaint need not set down in detail all the particulars of a plaintiff's claim against a defendant. Rule 8(a)(2) simply requires 'a short and plain statement of the claim showing that the pleader is entitled to relief. . . .' Fed.R.Civ.P. 8(a)(2). All a complaint need do is afford the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [cites omitted]. A motion to dismiss under Rule 12(b)(6) should not be granted 'unless *it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.*' [cites omitted]. [emphasis added].

Id. at 858-859.

Neither the Fourteenth Amendment nor 1983 were designed to redress all injuries incurred by reason of unfounded or malicious claims brought in state court actions. Nevertheless, if the misuse of a legal proceeding is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimension, and the tortfeasor is acting under color of state law, 1983 may be employed. *Nesmith* v. *Alford,* 318 F.2d 110, 126 (5th Cir. 1963), *cert. denied,* 375 U.S. 975, 84 S.Ct. 489, 11 L.Ed.2d 420 (1964).

Two essential elements must be pled and proven by a plaintiff to recover under 1983. First, there must be a deprivation of plaintiff's ". . . rights, privileges, or immunities secured by the Constitution and laws. . . ." of the United States. *Baker* v. *McCollan,* 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1970); *Parratt* v. *Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981). Second, the plaintiff must allege that the defendants deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *Monroe* v. *Pape,* 365 U.S. 167, 171-188, 81

S.Ct. 473, 476-484, 5 L.Ed.2d 492 (1961); *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 150, 90 S.Ct. 1498, 1604, 26 L.Ed.2d 142 (1970).

The absence of the first element (deprivation of a right secured by the Constitution and laws of the United States) induced the district court to dismiss the malicious prosecution claim.[4] Certainly, the complaint is wanting in particulars. However, reading the complaint most favorably to plaintiff, it is arguable that Dunn's interest in being free from unreasonable search and seizure, as guaranteed by the Fourth Amendment, was impaired by the officers' search.[5] This Court recognized in *United States* v. *Shye*, 492 F.2d 886, 891 (6th Cir. 1974), that when police officers seek to search a third party's home to execute an arrest warrant for another, ". . . a search warrant and not just an arrest warrant is necessary, . . ." absent exigent circumstances as well as probable cause to believe the suspect is in the home.[6] *United States* v. *Sumlin*, 567 F.2d 684, 686, n. 1 (6th

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[4] In addition to the requirements of 1983, a plaintiff claiming malicious prosecution must show: (1) the defendant instituted a criminal action against the plaintiff; (2) that prosecution ended in the plaintiff's favor; (3) there was no probable cause to initiate the criminal proceeding; and (4) the defendant acted maliciously. *Donaldson* v. *Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977).

[5] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

[6] We do not reach a conclusion as to whether probable cause existed in this case. Reviewing the record on Dunn's criminal appeal, the Tennessee Criminal Court of Appeals suggested that the son was not a resident. Identifying the question as a "close one" the court avoided the issue and reversed Dunn's criminal conviction on other grounds.

Cir. 1977), *cert. denied* 435 U.S. 932, 98 S.Ct. 1507 (1978), discussing *United States* v. *Shye,* 492 F.2d at 891. Explaining our prior decision in *United States* v. *McKinney,* 379 F.2d 259, 263 (6th Cir. 1967), noted in the Tennessee Criminal Court of Appeals opinion, we rejected the suggestion that the issuance of an arrest warrant is itself an exceptional circumsatnce obviating the need for a search warrant and required that "[a]s a constitutional minimum . . ., an arrest warrant can authorize entry into a dwelling only where the officials executing the warrant have reasonable or probable cause to believe the person named in the warrant is within. [cites omitted] . . ." *United States* v. *Jones,* 641 F.2d 425, 428 (6th Cir. 1981). Moreover, the United States Supreme Court has held that, absent exigent circumstances or consent, law enforcement officers can not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. *Steagald* v. *United States,* 451 U.S. 204, 101 S.Ct. 1642, 1649, 68 L.Ed.2d 38 (1981); *see Payton* v. *New York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

In our view the complaint can be fairly interpreted to allege that the defndants Wyllie and Hight, acting under color of law, deprived plaintiff of his constitutional right under the Fourth Amendment, as incorporated in the Fourteenth Amendment, to be free of unreasonable searches and seizures. They did so by arresting and prosecuting him because he attempted to exercise that right. The plaintiff should have an opportunity to amend his complaint and to prove the allegations. We hold that he has adequately stated a cause of action.

Wyllie argued upon appeal that plaintiff's action is time-barred. Congress did not enact a statute of limitations for actions brought under 1983; thus, it is the duty of federal courts to apply the state statute of limitations most analogous to the asserted claim. *Johnson* v. *Railway Express Agency, Inc.,* 489 F.2d 525, 529 (6th Cir. 1973), *aff'g,* 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975). It is agreed that the one-year

provision of 4A Tenn. Code Ann. § 28-3-104 is applicable.[7] The narrow issue raised here is whether plaintiff's 1983 action "accrued" under this statute upon the date when Dunn successfully defended the criminal charges against him in the Tennessee Court. Plaintiff was arrested on December 27, 1978, obtained a final dismissal when the Tennessee Supreme Court denied review on June 2, 1980, and filed this civil action in federal district court on August 27, 1980.

At common law it is unanimously recognized that the termination of the underlying criminal proceeding in favor of the accused is an essential element of a malicious prosecution action. *Donaldson* v. **Donaldson,** 557 S.W.2d 60, 62 (Tenn. 1977); *See* Restatement (Second) of Torts § 658 (1977).

The district court stated in a footnote:

> [s]uch reversal, however, is not an essential element of his § 1983 cause of action and accrual of that cause is not similarly delayed. *Rinehart* v. *Locke,* 454 F.2d 313, 315 (7th Cir. 1971). Consequently, any claim under § 1983 must be filed within one year from the actual date of the constitutional violation. 4A Tenn. Code Ann. § 28-3-104.

Thus, it was concluded that the malicious prosecution action accrued at the time of arrest.

However, in *Rinehart,* it is unclear whether the 1983 claim was for malicious prosecution or false arrest. Our reading of the case indicates it was couched in terms of false arrest and thus a reversal on appeal would be immaterial. This construction of *Rinehart* is in harmony with the great weight of authority and

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[7] That statute provides in pertinent part:

> . . . civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, . . . shall be commenced within one (1) year *after* [the] *cause of action accrued.* [emphasis added].

this Court finds that favorable termination of the prior criminal proceeding marks the point at which a 1983 claim for malicious prosecution accrues. *Singleton* v. *City of New York,* 632 F.2d 185, 194-195 (2d Cir. 1980), *cert. denied* 450 U.S. 920, 101 St.Ct. 1368 (1981); *Morrison* v. *Jones,* 551 F.2d 939, 940-941 (4th Cir. 1977); and *Sullivan* v. *Choquette,* 420 F.2d 674 (1st Cir. 1969), *cert. denied* 398 U.S. 904, 90 S.Ct. 1691, *reh'g denied* 399 U.S. 938, 90 S.Ct. 2237 (1970).[4]

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[4] The U.S. Court of Appeals for the Second Circuit in *Singleton* v. *City of New York,* 632 F.2d 185, 194-195 (2d Cir. 1980), *cert. denied* 450 U.S. 920, 101 S.Ct. 1368 (1981), ruled plaintiff's claim of deprivation of 1983 civil rights through malicious prosecution may not be stated without alleging and proving that prosecution terminated in some manner indicating that plaintiff was not guilty of the offenses charged.

Singleton was arrested on November 14, 1975. The prosecution adjourned in contemplation of dismissal on June 14, 1976, with final dismissal on December 14, 1976. Plaintiff filed his civil suit on February 19, 1979. The analogous state statute of limitations is three years from accrual of the action. As to the accrual of the action, the court held, "[t]urning to Singleton's malicious prosecution claim, it is undisputed that this claim accrued on December 16, 1976, and that it was therefore timely filed." *Id.* at 193. The case was dismissed on other grounds.

In *Morrison* v. *Jones, et al.,* 551 F.2d 939, 940-941 (4th Cir. 1977), defendant policy officers claimed the one year state statute of limitations accrued on the date of the accused's arrest and barred his § 1983 action for malicious prosecution. The U.S. Court of Appeals for the Fourth Circuit held: "[s]ince federal law does not define the elements of the claim, we adopt the common law rule that favorable termination of the proceedings is essential. [cites omitted]. Consequently, the claim does not accrue until the proceedings are terminated. [cites omitted]. *Id.*

While the opinion is ambiguous as to the precise nature of the claim set out in *Sullivan* v. *Choquette,* 420 F.2d 674 (1st Cir. 1969), *cert. denied* 398 U.S. 904, 90 S.Ct. 1691, *reh'g denied* 399 U.S. 938, 90 S.Ct. 2237 (1970), the case has been interpreted to require a termination of the prior proceeding in a manner favorable to the plaintiff for a 1983 malicious prosecution action to lie. *Id.* at 676, *see Morrison* v. *Jones,* 551 F.2d at 941.

To require this type 1983 claim to be filed prior to the final successful disposition of the underlying criminal charge would create unwarranted federal intrusion into state affairs. Such a claim does not fully accrue until the successful termination of the state criminal proceedings. Normally a conviciton alone is sufficient to establish probable cause of a prosecution. We think, therefore, that the statute of limitations in question begins to run at the time of the termination of the state proceeding.

This Court, in *Kruz* v. *State of Michigan*, 548 F.2d 172, 174 (6th Cir. 1977), *cert. denied* 434 U.S. 972, 98 S.Ct. 526, 54 L.Ed.2d 462 *reh'g denied* 434 U.S. 1089, 98 S.Ct. 1289, 55 L.Ed.2d 796 (1978), questioned the dismissal of a 1983 malicious prosecution claim for untimeliness. The Court recognized that under state law the action accrued on the date the Michigan Supreme Court dismissed the underlying criminal action in favor of the accused. *Id.* at 174.[9]

Since Dunn filed his civil action within one year of the Tennessee Court's favorable termination of the underlying criminal proceeding, the action is not barred.

Finally, we affirm the judgment of the district court dismissing the complaint as against Sheriff Wix and Sumner County.

A local government may not be sued under 1983 for injuries caused solely by its agents under the theory of respondeat superior, unless those persons are executing the government's

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[9] Since the accused was charged on April 9, 1970; the Michigan Supreme Court's final decision in his favor was entered April 21, 1972; and plaintiff filed his action alleging violations of his federally protected civil rights on April 18, 1974, under Michigan's applicable two year statute of limitations, the action would not be time-barred. However, finding all state defendants immune to the action, this court did not reach the issue and affirmed the district court's dismissal of the action without further addressing the accrual issue. *Kurz* v. *State of Michigan*, 548 F.2d at 175.

policies or customs. *Monell* v. *New York City Department of Social Services,* 436 U.S. 658, 691, 695, 98 S.Ct. 1028, 56 L.Ed.2d 611 (1978). Appellant made no allegation that any deprivation of his rights resulted from the implementation of any policy or custom adopted by Sumner County.

Appellant concedes that Sheriff Wix is not a proper defendant on the theory of respondeat superior. *Monell* v. *New York Department of Social Services,* 436 U.S. at 694, 98 S.Ct. at 2037, 56 L.Ed.2d 611; *Wilson* v. *Beebe,* 612 F.2d 275, 275-276 (6th Cir. 1980). The United States Supreme Court has held that a 983 action cannot lie against a police supervisor for failure to prevent policy misconduct, absent a showing of direct responsibility for that improper action. *See Rizzo* v. *Goode,* 423 U.S. 362, 373-377, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). What is required is a causal connection between the misconduct complained of and the official sued. There is no such allegation with respect to Sheriff Wix.

Officers Wyllie and Hight are the two individuals who are alleged to have actively caused the events plaintiff charges violated his civil rights. Allegations that these two officers were personally involved in the incident, absent a recognized immunity, establish them as proper defendants to this action. *Baskin* v. *Parker,* 602 F.2d 1205, 1208 (8th Cir. 1979).

Accordingly, the judgment of the United States District Court for the Middle District of Tennessee dismissing the 1983 action of Edward Lee Dunn against David Wyllie and Phillip Hight is REVERSED. In compliance with this opinion the Appellant shall be afforded an opportunity to amend his complaint. The judgment of the district court dismissing the complaint against Sumner County and Mayo Wix is AFFIRMED. The judgment of the district court dismissing the 1985 claim by Dunn aainst all the Appellees is AFFIRMED.

No costs shall be awarded. Each party shall pay their own costs on appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Docket No. 80-3451

Edward Lee Dunn,

vs.

Gene Roberts, Commissioner, Department of Safety, et al.

MEMORANDUM

Plaintiff has brought this suit pursuant to 42 U.S.C. §§1983 and 1985(3) seeking monetary damages for an unlawful search of his home, false arrest, false imprisonment, and malicious prosecution. Each defendant moves the Court to dismiss the complaint or failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). Alternatively, defendants assert that plaintiff's claims are barred by the one year statute of limitations. 4A TENN. CODE ANN. §28-3-104. For reasons discussed below, the Court finds that plaintiff's complaint must be dismissed against all defendants.

Plaintiff alleges that on December 26, 1978, Tennessee State Trooper Wyllie and Deputy Sheriff Phillip Hight came to his house to arrest his son pursuant to a warrant for a misdemeanor traffic violation. When plaintiff informed Wyllie and Hight that his son was not there, they requested permission to search the house. Upon plaintiff's denial of permission for the search, Wyllie arrested him for interfering with the duty of a police officer. After the search of plaintiff's home for his son proved unsuccessful, Wyllie and Hight handcuffed him and transported him to the Sumner County Jail where he was booked and held until he posted bond.

Subsequently, plaintiff was convicted in the Circuit Court of Sumner County for "interfering with the duty of a police officer" and fined $2.00. On March 28, 1980, the Tennessee Court of Criminal Appeals reversed the conviction holding that proof of resistance was insufficient to establish the element of "interference" necessary to the commission of the offense charged. In addressing the question of probable cause, Judge Daughtrey stated that "the proof may be sufficient to give rise to a reasonable belief on the part of the officers that Charles Dunn [the son] was on the premises". She concluded, however, that the question was close and that there was no need to make a redetermination of probable cause because the element of proof of resistance was the controlling factor in the reversal of the trial court.

The Tennessee Supreme Court then denied the State's application for permission to appeal. Suit was filed in this Court on August 27, 1980.

In their respective motions to dismiss, defendants contend that plaintiff has failed to state a cause of action under 42 U.S.C. §1985(3). Section 1985(3) of the Anti-Ku Klux Klan Act of 1871 makes it a federal tort for a private group to "conspire... on the premises of another for the purpose of depriving... any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws..." In order to state a claim under this section the complaint must allege two necessary elements: (1) the existence of a conspiracy, and (2) some "class-based discriminatory animus behind the conspirators' action". *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (1971); *Browder* v. *Tipton,* 630 F.2d 1149, 1150 (6th Cir. 1980). As plaintiff's complaint contains no allegations that defendants acted with a clas-based invidiously discriminatory animus, the claim must be dismissed against all defendants.

At this juncture, each of the defendants' motions to dismiss will be addressed individually.

Suit may not be maintained against the State of Tennessee or a Tennessee agency under 42 U.S.C. §1983 for monetary damages because the Eleventh Amendment immunizes states and their agencies from federal lawsuits brought by individuals unless the state has consented to the filing of such a suit. Quern v. *Jordan,* 440 U.S, 332 (1979); *Alabama* v. *Pugh,* 438 U.S. 781 (1978); *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Tennessee has not abrogated this immunity. 4 TENN. CODE ANN. § 20-13-102; *American Civil Liberties Union* v. *Tennessee,* 496 F. Supp. 218,220 (M.D. Tenn. 1980). As plaintiff's claims are for monetary damages only, the state and the Tennessee Highway Patrol are not proper dedfendants in this action and all claims against them must be dismissed.

As for Gene Roberts, Commissioner of the Department of Safety, plaintiff's complaint does not allege that he was in any way personally involved in the commission of the alleged illegal acts. Absent a showing of such personal involvement by way of active participation, encouraging or directing the commission of these acts by his subordinates, there can be no recovery against him. *Coffy* v. *Multi-County Narcotics Bureau,* 600 F.2d 570, 580 (6th Cir. 1979). Liability under §1983 may not be imposed upon an official solely on the basis of *respondeat superior* or vicarious liability. *Id.; Monell* v. **Department of Social Services,** 436 U.S. 658,664 n. 7 (1978). Accordingly, the 42 U.S.C. § 1983 claim against this defendant must also be dismissed.

Unquestionably, plaintiff has no right to civil redress against William Leech, Attorney General for the State of Tennessee in connection with his participation in presenting the State's case on appeal or in connection with the advocacy functions inherent in his role as a prosecutor. *Imbler* v. *Pachtman,* 424 U.S. 409. 431 (1976); *Kurz* v. *Michigan,* 548 F.2d 172 (6th Cir. 1977), *cert. denied,* 434 U.S. 972 (1977). This immunity attaches even if his

actions were undertaken maliciously, intentionally or in bad faith. *Morton* v. *Liddell,* 620 F.2d 1375, 1379 (10th Cir. 1980). Clearly, all claims against General Leech must be dismissed.

Plaintiff additionally asserts a §1983 claim against Sumner County. However, a local government may not be sued under §1983 for injuries inflicted solely by its agents. The government as an entity is responsible under §1983 for acts committed by its employees or agents only when those individuals execute that government's policies or customs. *Monell* v. *New York City Department of Social Services, supra* at 695 (1978). Claims of *respondeat superior* are clearly inapplicable to governmental liability under §1983. *Id.* As plaintiff's complaint contains no allegations that the alleged deprivation of rights resulted from an implementation of any policy or custom adopted by Sumner County, the cause of action asserted under this section against Sumner County must be dismissed.

Plaintiff's complaint fails to allege that Mayo Wix, Sheriff of Sumner County, in any way personally participated in the alleged deprivation of plaintiff's civil rights. A §1983 action cannot lie against a police supervisory officer for failure to prevent police misconduct absent a showing of direct responsibility for that improper action. *Rizzo* v. *Goode,* 423 U.S. 362, 373-377 (1976); *Wilson* v. *Beebe,* 612 F.2d 275 (6th Cir. 1980). The claim against Sheriff Wix is also dismissed.

Trooper Wyllie and Deputy Sheriff Hight are the two individuals who actively brought about the series of events upon which plaintiff bases his civil rights claims. Both of these defendants aver that the statute of limitations acts as a complete bar to the claims asserted against them. As congress has not enacted a statute of limitations with regard to actions brought under the Civil Rights Act, 42 U.S.C. §1983, the federal courts must look to state statutes to determine the length of time a plaintiff has to pursue his action. *See Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454 (1975). It is well settled that 4A TENN.

CODE ANN. § 28-3-104 subjects §1983 actions to a one year statute of limitations. *Elmore* v. *Evans,* 449 F. Supp. 2 (E. D. Tenn. 1976) *aff'd* 577 F.2d 740 (6th Cir. 1978). That statute provides in pertinant part:

> ...Civil actions for compensatory or punitive damages ... brought under the federal civil rights statutes... shall be commenced within one (1) year after [the] cause of action accrued.

Plaintiff's claims of illegal search, false imprisonment and false arrest all accrued on December 26, 1978. However, his complaint was filed on August 27, 1980, over one year from the accrual date. Consequently, each of those claims is time-barred.

In addressing the claim termed malicious prosecution, the Court notes that this claim under §1983 is distinctly different from the common law tort concept of malicious prosecution cognizable in Tennessee state courts. Conduct that may give rise to an action for the tort of malicious prosecution also constitutes a violation of §1983, only if, acting under color of state of law, the defendants have subjected plaintiff to a deprivation of constitutional magnitude.[1] See, *Nesmith* v. *Alford,* 318 F.2d 110,126 (5th Cir. 1963); *Baker Phosphate Corp.* v. *Muirhead,* 581 F.2d 1187,1189 (5th Cir. 1978); *Paskaly* v. *Seale,* 506 F.2d

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[1] It must be noted that contrary to plaintiff's argument, civil rights claims against Wyllie and Hight for "malicious prosecution" under §1983 may be time-barred in this Court. Clearly, a common law tort cause of action for malicious prosecution would not arise until March 28, 1980, the date of reversal of plaintiff's conviction. *Morgan* v. *Duffy,* 94 Tenn. 686, 30 S.W. 735 (1895); *Donaldson* v. *Donaldson,* 557 S.W.2d 60,62 (Tenn.S.Ct. 1977). Such reversal, however, is not an essential element of his §1983 cause of action and accrual of that cause is not similarly delayed. *Rhinehart* v. *Locke,* 454 F.2d 313, 315 (7th Cir. 1971). Consequently, any claim under §1983 must be filed within one year from the actual date of the constitutional violation. 4A TENN. CODE ANN. §28-3-104.

1209, 1212 (9th Cir. 1974); *Curry* v. *Ragan,* 257 F.2d 449,450 (5th Cir. 1958); *Rosales* v. *Lewis,* 454 F.Supp. 956,960 (S.D. Iowa 1978); *Atkins* v. *Lanning,* 415 F.Supp. 186,190 (N.D.Okla. 1976). "But, standing alone, a claim for malicious prosecution — although it may describe conduct reprehensible in the extreme — is not enough to support a cause of action under §1983." *Pyles* v. *Keane,* 418 F.Supp. 269,276 (S.D.N.Y. 1976).

The fact that a tort may have been committed by a state officer does not automatically confer a federal right of action. *Paul* v. *Davis,* 424 U.S. 693 (1976); *Estelle* v. *Gamble,* 429 U.S. 97 (1976). Recently, the Supreme Court refused to constitutionalize the tort of false imprisonment under the specific facts in *Baker* v. *McCollan,* 443 U.S. 137 (1979). The Court stated, "Section 1983 imposes liability for violations protected by the Constitution, not for violations of duties of care arising out tort law." *Id.* at 146.

In the present case, this Court finds that plaintiff has failed to state a claim actionable under §1983. Apart from the plaintiff's allegation that he was arrested without probable cause, the record before the Court is devoid of any further allegations of violations of his constitutional rights, e.g., a claim that any of the defendants provided false testimony in order to further the prosecution. Rather, it appears that plaintiff was accorded the full measure of due process to which he was entitled under the Fourteenth Amendment. Any deprivation of liberty or property which the plaintiff alleges occurred only as a result of or attendant to constitutionally legitimate proceedings. In fact, it was precisely those proceedings that ultimately vindicated his position.

An appropriate order is contemporaneously entered.

This the 9th day of March, 1981.

John T. Nixon
UNITED STATES DISTRICT JUDGE